IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

HERTZ CANADA LIMITED

(the "Employer")

-and-

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 378

(the "Union")

(Article 21.06 Overtime Grievance)

ARBITRATOR:	John B. Hall
APPEARANCES:	Gabriel M Somjen and Casey Leggett, for the Employer Jitesh Mistry, for the Union
DATES OF HEARING:	May 8, 9, 10, 11, 15 and 16, 2012
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF AWARD:	June 7, 2012

I. INTRODUCTION

The parties agreed that three grievances would be consolidated for arbitration. The three matters will be referred to as the Special Protection Grievance (filed October 27, 2009), the Overtime Grievance (filed November 19, 2009) and the Shift Scheduling Grievance (filed July 8, 2011).

The Employer objected to the arbitrability of the first and second grievances, along with three issues arising from the third grievance; the latter being: use of the vacation relief (VR) position, the practice of part-time employees working 24 hours per week, and shift scheduling in accordance with Letter of Understanding No. 4 to the Collective Agreement. The Employer maintained the Union was barred from litigating all of these matters pursuant to the doctrines of *res judicata*, abuse of process, issue estoppel and principles of the *Labour Relations Code* because of a prior proceeding (the "Layoff Arbitration") and my two awards in that matter: see *Hertz Canada Limited -and- COPE, Local 378* (unreported), dated April 14, 2011 (the "Initial Award") and September 26, 2011 (the "Supplemental Award"). The Employer accordingly submitted the three grievances should be dismissed.

The Employer's objections were heard separately from the merits. In a preliminary ruling dated May 2, 2012, I found that a specific, part-time VR position had been canvassed at some length during the Layoff Arbitration, and wrote:

> … [I]t can be fairly stated that the part-time VR position was "well tilled soil" throughout the entire Layoff Arbitration. Some of the arguments the Union now seeks to advance through the Shift Scheduling Grievance were in fact the subject of evidence, but were not carried forward in its written submissions; other arguments were expressly or implicitly rejected in my Initial and Remedy Awards. I agree with the Employer that the Union is essentially attempting to reverse unfavourable aspects of those Awards. Further litigation over the VR position should not be permitted: *Telus Communications Inc. and Telecommunication Workers' Union* (2006), 158 LAC (4th) 67 (McConchie), at paras. 39 and 47-48; affirmed by 2007 BCSC 1453.

In the result, I ruled that the three grievances were arbitrable, save to the extent that they involved matters concerning the part-time VR position that was examined in detail during the Layoff Arbitration.

The merits of the grievances were then heard together. However, final argument regarding the Special Protection Grievance was delayed when the parties elected to pursue "11th hour" settlement discussions. This award deals with the Overtime Grievance and is being issued concurrently with the Shift Scheduling Grievance. Unfortunately, the parties were unable to resolve the Special Protection Grievance, and my award in that matter will be issued at a later date.

By way of general background, a brief description of the Employer's operations can be found at pages 11-13 of my Initial Award in the Layoff Arbitration.

II. SUMMARY OF THE PARTIES' POSITIONS

The Union submits that employees are entitled under the Collective Agreement to a minimum of four hours pay at overtime rates when they work at times, or on dates, different from their shift schedule established at the time of a shift bid posting. This entitlement arises, says the Union, whether the employees are full-time or part-time, and regardless of the amount of notice given regarding the shift change. The Union's position is based almost entirely on what it says is the clear language of the Collective Agreement, beginning with Article 19.01 which reads:

ARTICLE 19 - HOURS OF WORK AND SHIFTS

> 19.01 Each Full Time Regular and Part Time Regular Employee will have an established shift. Shifts and shift hours required will be designated by the Employer. Changes of shift bids shall be posted for the information of affected Employees for a minimum of three (3) calendar days with such shift bids to begin at the start of the next full week; and whenever possible, the Company shall post such bid at the beginning of the week

> prior to the effective date of the bid. Employees will select shifts in order of seniority.

The Union proceeds to argue as follows at paragraphs 50-54 of its written Outline of Argument:

> We say that the only reasonable interpretation of the above-excerpted passage from the Collective Agreement is that at the time a particular shift is posted and bid upon the date and times of that shift must be "established". That is, the Union member bidding on such a shift must be made aware of what days and times s/he will be scheduled to work at the time the employee bids on the shift. Otherwise, it cannot really be said that the shift is "established" at all.
>
> If there was any doubt as to what an established shift schedule is, that question was put to bed in this arbitration board's earlier award, *Hertz Canada Limited and Canadian Office and Professional Employees' Union, Local 378 (VSA and CSR Layoff Grievances)*, unreported, April 14, 2011 (Hall). At page 33 of that decision, the arbitrator stated that "it is my opinion that 'scheduled hours' means the hours on the established shifts schedules." We say that the converse must also apply: an established shift schedule must mean the employee's "scheduled hours."
>
> When the Employer departs from these established days and times of work, it must pay overtime under Article 21.06 of the Collective Agreement:
>
> > Employees called out to work outside their regular shift or who are called in during scheduled days off, vacations or Statutory Holidays, will receive a minimum of four (4) hours pay at overtime rates provided the employee reports for such work.
>
> "Overtime rates" are established at Article 21.01 of the Collective Agreement:
>
> > Time and one-half (1 1/2x) shall be paid for all hours worked in excess of eight (8) hours in one day and/or forty (40) hours worked in one (1) week. Double (2x) time shall be paid for all hours worked in excess of ten (10) hours in one day and four (4) hours on a scheduled day off. Shifts will be worked in a continuous period except for meal breaks and will not be "split".
>
> We say that any employee who works outside of his or her established shift schedule designated at the time they bid on the posted position is entitled to a minimum of four hours pay at overtime rates set out in Article 21.01. This applies to situations where

a) the employee is called before her shift and asked to work a different time;
b) the employee is called before her shift and asked to work on a day off; and
c) the employee is asked during her shift to work later.

Again, we say that the Collective Agreement language speaks for itself and there is no ambiguity in Article 21.06.

The Union disputes the Employer's position that overtime does not apply to situations where an employee volunteers to work "extra hours". It submits such a distinction cannot be found in the Collective Agreement. The Union takes issue as well with the Employer's reliance on evidence of past practice.

The Employer relies principally upon Article 21.01 (reproduced above). It says the practice has always (and only) been to pay employees overtime rates when they work more than 8 hours in a day, or more than 40 hours in a week. Therefore, a part-time employee who works more than 24 hours in a week, but less than 40 hours, is not entitled to overtime rates unless the employee works more than 8 hours in one day. At the same time, the Employer allows that overtime rates are payable when an employee is required to work "mandatory extra hours". In this regard, the Employer relies on Article 21.10 to establish what it describes as "the voluntary nature of the process in place":

21.10 Overtime will be offered in an equitable manner among the employees in a classification who are able to perform the work. In the event overtime commitments cannot be met on a voluntary basis, the qualified employee(s) with least seniority will be selected, subject to the notice required by 21.05.

Based on this provision, the Employer's practice has been to not pay part-time employees a premium to work less than 8 hours per day and less than 40 hours per week if they volunteer to work additional hours. Further, if employees are given 24 hours notice of a shift change, the Employer asserts they are not entitled to the premium of two additional hours pay required by Article 21.12 for shorter notice:

21.12 The Parties agree that the Company will pay a premium of an additional two (2) hours pay, at the employees regular hourly rate of pay, per shift

> (until employee returns to their regular shift) if an employee is called to work outside their regular shift, provided however, the employee receives less than twenty-four (24) hours notice to report to a different shift.

Paragraph 11 of the Employer's written argument summarizes its position regarding entitlement to pay at overtime rates and the Article 21.12 premium as follows (point f. has been omitted because it is the subject of a separate grievance that the parties agreed to hold in abeyance):

> 1. The following summarizes the Employer's submission regarding entitlement to pay at overtime rates and the entitlement to the 21.12 premium:
>
> a. The Employee works more that 8 hours in a day = entitled to pay at overtime rate (21.01)
>
> b. The Employee works more than 40 hours per week = entitled to pay at overtime rate (21.01)
>
> c. If the Employee is <u>compelled</u> to work overtime = entitled to pay at overtime rates (21.10)
>
> d. If the Employee volunteers to work extra hours (less than 8 in a day or 40 in a week) = NOT entitled to pay at overtime rates
>
> e. If the Employee is compelled to change shift = entitled to premium under 21.12, only if not given 24 hours notice
>
> * * *
>
> g. If an Employee is called-out or called-in, he is entitled to at least 4 hours of pay at overtime rates.

The Employer maintains its position is supported by a plain reading of the relevant Collective Agreement provisions. Alternatively, it relies on extrinsic evidence of past practice and bargaining history. In the further alternative, the Employer submits the Union is estopped from taking the position now advanced at arbitration.

III. PAST PRACTICE

Ms. Dolly Safiq has been with the Employer for about 30 years, and has held a management position since 1996. She is presently the Area Manager.

Ms. Safiq was taken in direct examination to Articles 21.01 and 21.06, and was asked to explain how she has administered those provisions of the Collective Agreement. She replied that Article 21.01 establishes "the caps" where the Employer must pay overtime. Thus, if a full-time or part-time employee works more than 8 hours in a day, the first two hours are paid at time and one-half, and the remaining hours are paid at double time. Further, if an employee works more than 40 hours in a week (e.g. an extra day), then hours 41-44 are paid at time and one-half, and the remaining hours are paid at double time. Ms. Safiq added that the Employer has followed Article 21.01 "exactly as written".

Ms. Safiq was later asked about a part-time employee working less than 40 hours per week in a situation where the Employer has extra hours that it wants worked. She explained the Employer offers the work equitably to available employees. Until after the strike which ended on July 1, 2010, the Employer did not have a problem finding volunteers. During the earlier period, the Employer only paid overtime rates if employees worked more than 8 hours in a day or 40 hours in a week. After the strike, the Employer began experiencing issues with employees agreeing to take extra hours voluntarily. There is a Collective Agreement provision which allows the Employer to "force" employees to do the work and, in those circumstances, the Employer must pay overtime rates even where it involves less than 8 hours per day or 40 hours per week. When asked which provision allows the Employer to "force" employees to work overtime, Ms. Safiq pointed to the second sentence in Article 21.10 and noted Article 21.05 directs the Employer to notify the employees by the second hour of their shift.

Ms. Safiq was also asked specifically about the Union's grievance, and the claim that a 24 hour part-time employee should be paid at overtime rates where the employee volunteers to work outside a scheduled shift. She testified that "since I was a bargaining unit member [the practice] has always been that voluntary [work] is not paid at overtime rates".

The Employer introduced numerous time cards for part-time employees from 2007, 2008 and 2009 which show the employees were paid according to the practice described by Ms. Safiq. She testified as well that no grievance was filed until the present dispute arose.

IV. THE GRIEVANCE

As indicated, the Overtime Grievance was filed on November 19, 2009. It came in the form of a letter from Union Representative Glen MacInnes to Ms. Safiq, which read in part:

> The Union is in receipt of your email dated November 12, 2009 in which the employer takes the position that employees who work unscheduled hours are not entitled to time and one half according to Article 21 of the Collective Agreement.
>
> It is the Union's contention that the Employer's refusal to pay overtime rates for unscheduled hours worked is in violation of Article 21.06 and all other applicable provisions of the Collective Agreement.
>
> The Union seeks to have the Union and any person adversely affected, be made whole in all respects which would involve, but is not limited to, payment of full compensation for any and all lost income, benefits and other entitlements, monetary or otherwise. All such redress is to be applied on a fully retroactive basis and is to include, without limitation, the payment of interest in accordance with the Bank of Canada prime rate. The Union further reserves the right to seek any other damages or corrective action it deems appropriate under the circumstances.

The Union's position on remedy was modified at arbitration. It now seeks an order and declaration that "if, at any time, employees work shifts outside that shift schedule established at the time that they bid on the posted position or the shift they were initially assigned, they are entitled under the Collective Agreement to a minimum of four hours pay, at overtime rates, and the Employer has breached the Collective Agreement in failing to do so". The Union does not seek "any other retroactive remedy" under the Overtime Grievance.

V. NEGOTIATING HISTORY

The Union points to what it characterizes as prior attempts by the Employer "to narrow the language of Article 21.06 (and its predecessor provisions) without success". This has involved seeking to exclude regular part-time employees from the provision during negotiations for the 1984-1989 Collective Agreement, and seeking to delete the words "called to work outside their regular shift" from the provision during negotiations for the 1989-1992 Collective Agreement. Neither proposal was agreed to by the Union.

On the other hand, the Employer points to a proposal regarding Article 21.12 tabled by the Union on October 29, 2009 during the most recent round of negotiations (the proposed amendment is underlined):

> The Parties agree that the Company will pay a premium of an additional two (2) hours pay, at the employees regular hourly rate of pay, per shift (until employee returns to their regular shift) if an employee is called to work outside their regular shift, provided however, the employee receives less than twenty-four (24) hours notice to report to a different shift. <u>The premium shall be in addition the double time (2X) their regular rate paid to the employee who works outside their regular shift. If the employee receives more than twenty-four (24) hours notice to work outside their regular shift, the employee will be paid double time (2x) their regular rate. Nothing in this Article allows the Employer to alter the regular shift without following Article 19.01.</u>

This proposal was not accepted, and the Employer says it was put forward by the Union "because it did not have the entitlement it now argues for". Mr. MacInnes testified, however, that the Union bargaining committee wanted to clarify and not change the language, and advised the Employer at the table that this proposal did not represent a change in intent. He added that the proposal was prompted by two occasions where the Employer had wanted to move an employee without a shift bid, and the Union had agreed on a without prejudice basis.

Finally, a series of exchanges between the parties during the most recent round of bargaining bears on the Employer's estoppel argument. Mr. MacInnes initiated the exchanges

when he wrote to Jeff Nayda, the Employer's Manager of Labor Relations and its spokesperson in bargaining, on January 21, 2010:

> During the mediation process at the Labour Relations Board on January 20, 2010, at approximately 1:30pm, the employer tabled a proposal which contained the following language for the first time:
>
> > Note: All Company proposals not incorporated into this final offer are withdrawn without prejudice to any established practices(s). Further the Company herewith serves notice of its intent to continue the practice(s) without modification.
>
> Please provide the Union with an explanation of the "established practice(s)" to which you are referring.
>
> On the same day at approximately 4:25pm, the Union notified the employer that:
>
> > The Union serves notice without prejudice to any outstanding grievances or arbitrations that regardless of any practice(s) in the past, the Union will exercise all its collective agreement rights upon ratification of the new collective agreement.
>
> By this letter, we reiterate our notice as stated above.

The Union then received an amended offer from the Employer via facsimile on January 27, 2010. In order to assess the proposal, the Union sought clarification regarding two issues. The letter sent the next day by Mr. MacInnes to Mr. Nayda included the following (the Overtime Grievance had, of course, been filed the previous November):

> Your proposal no longer contains the notice to the Union that you will continue your "established practices" you have described in your January 20, 2010 offer. The Union understood this to mean the company would continue the alleged past practices even if they are in violation of the collective agreement.
>
> To date, we have not received a copy of that list of alleged "established practices" as requested in our January 21, 2010 letter to you. Furthermore, we put you on notice that, without prejudice to any grievances or arbitrations, the Union will enforce all its rights under the collective agreement upon ratification of a new collective agreement.
>
> It is our understanding that the Employer no longer takes that position. If our understanding is incorrect, please advise the Union by 4:30pm PST today.

Mr. Nayda's reply was also dated January 28, 2010, and he responded on this point as follows:

> With regard to the subject of "established practices," the company's statement contained in the offer of January 20 was an annotation to the company's withdrawn proposals, and, therefore, was not either a proposal or part of the offer. Attach as much or little weight to it as you wish, but do not interpret it as a blanket statement of the company's intent to run amuck of the Collective Agreement. The removal of the statement from the amended offer is not a relinquishment of any rights going forward, and to be "fair and balanced" on this subject, we acknowledge and respect the union's position on this issue.

The remaining element of what the Union says was "global estoppel notice" is found in the Memorandum of Agreement which concluded the current 2009-2013 Collective Agreement (italics added):

> The Employer and the Union ("the Parties") do hereby expressly and mutually agree as follows:
>
> X. ALL OTHER TERMS
>
> * * *
>
> 5. All items not addressed herein will be considered withdrawn on a without prejudice basis. Notwithstanding the above, *the Union served notice that without prejudice to any outstanding grievances or arbitrations that regardless of any practice(s) in the past, the Union will exercise all its collective agreement rights upon ratification of the new collective agreement*.

IV. ANALYSIS

I have approached the interpretive task at hand bearing in mind the legal principles that were quite extensively and capably reviewed in *Victoria Times Colonist, a Division of Canwest Publications Ltd. and Victoria-Vancouver Island Newspaper Guild Local 30223 et al* (2010),

203 LAC (4th) 297, [2010] BCCAAA No. 182 (Germaine). That award relied in turn on the familiar "rules of interpretation" compiled in *Pacific Press -and- Graphic Communications International Union, Local 25-C*, [1995] BCCAAA No. 637 (Bird):

> 1. The object of interpretation is to discover the mutual intention of the parties.
> 2. The primary resource for interpretation is the collective agreement.
> 3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
> 4. Extrinsic evidence may clarify but not contradict a collective agreement.
> 5. A very important promise is likely to be clearly and unequivocally expressed.
> 6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
> 7. All clauses and words in a collective agreement should be given meaning, if possible.
> 8. Where an agreement uses different words one presumes that the parties intended different meanings.
> 9. Ordinarily words in a collective agreement should be given their plain meaning.
> 10. Parties are presumed to know about relevant jurisprudence.
>
> … Not all rules of interpretation are rigidly binding. Common sense and special circumstances must not be ignored. (at QL para. 27)

It is appropriate to initially address the subject of extrinsic evidence. The two most common types of extrinsic evidence are part of the record here (i.e. negotiation history and past practice). The evidence was admitted at arbitration consistent with the directions given by the Labour Relations Board in *Nanaimo Times, Ltd.*, BCLRB No. B40/96. But it has long been recognized that extrinsic evidence cannot be used to alter the meaning of collective agreement terms: see the fourth rule above, and *Re The Corporation of the City of Victoria and Canadian Union of Public Employees, Local 50* (1974), 7 LAC (2d) 239 (P.C. Weiler), at QL p. 5. I have concluded in my deliberations that Article 21 may not be "perfectly drafted" as the Employer allows; however, even when considered in light of the extrinsic evidence, the Collective Agreement is sufficiently clear on its face that there is no need to go beyond the words chosen by the parties to discern their mutual intent. Relying on the extrinsic evidence to reach a different

outcome -- and, more particularly, the practice evidence put forward by the Employer -- would effectively constitute an amendment to Article 21.

Another reason for rejecting the practice evidence arises from the "strict limitations" established long ago in *John Bertram & Sons Co.* (1967), 18 LAC 362 (P.C. Weiler). The fourth limitation obliges the Employer to demonstrate that "members of the [Union] hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice". There is no such evidence before me. And, while the Employer argues the Union should have been aware of its practice regarding a matter "as dear as overtime", the circumstances are readily distinguishable from *Re Insurance Corp. of British Columbia and O.P.E.I.U., Local 378* (2002), 106 LAC (4th) 97 (Hall), where knowledge on the part of responsible union officials could be reasonably inferred (see especially pp. 108-109).

This leaves the question of whether the Union is estopped from advancing an interpretation of Article 21 which does not align with the practice evidence. The Employer submits more specifically that the Union is estopped from asserting that employees who work less than 40 hours per week or 8 per day should be paid overtime, since the Union did not grieve nor did the Union ever, in any way, put the Employer on notice that the Employer's interpretation and application of 21.01, 21.06, 21.10 and 21.12 was wrong.

The Supreme Court of Canada has recently confirmed the authority of labour arbitrators to apply equitable principles: *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59. The *ICBC* award cited above summarized the elements of the so-called "modern doctrine" of estoppel in this jurisdiction:

> An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out. (p. 108)

My earlier finding regarding the Employer's failure to establish acquiescence by Union representatives having real responsibility for administration of the Collective Agreement is fatal to its plea of estoppel. There was no express representation by the Union that it would not rely on its legal rights and, in the absence of knowledge, there was no "obligation to speak out". But even if an estoppel by practice may have existed under the 2006-2009 Collective Agreement, the Employer was put on notice of the Union's position when the grievance was filed, and the parties' exchanges during negotiations effectively brought an end to any estoppel.

There are two related reasons for this last determination. First, the Employer served notice during mediation (again, after the Overtime Grievance had been filed) of "its intent to continue [any established practice(s)] without modification". The Union asked for an explanation of the "established practice(s)". I have not been directed to any communication from the Employer that was responsive to this request and, in my view, it would not be equitable to allow the Employer to rely on its overtime practice given its failure to respond to the Union's request. Second, and in any event, the Union squarely put the Employer on notice that "without prejudice to any grievance or arbitrations, the Union will enforce all its rights under the collective agreement upon ratification of a new collective agreement." This notice was confirmed in clause X.5 of the Memorandum of Settlement which resolved the labour dispute. I am not persuaded by the Employer's submissions that the timing of the Overtime Grievance and these exchanges are of no consequence because they all occurred after negotiations began in October of 2009. The fact is that the Union provided express notice of its intent to "exercise all its collective agreement rights upon ratification of the new collective agreement" before negotiations concluded, and the Employer knew specifically that the interpretation of the overtime provisions was in dispute. In light of these circumstances, I am unable to discern any "inequitable detriment to the Employer" (see *ICBC*, at p. 108) if the Union is now allowed to pursue the Overtime Grievance based on the plain language of the Collective Agreement.

This brings me to the overtime provisions themselves. Most of the relevant Articles were canvassed when summarizing the parties' submissions; however, they are repeated here for proximate reference and in the same order as found in the Collective Agreement:

ARTICLE 21 - OVERTIME

21.01 Time and one-half (1 1/2x) shall be paid for all hours worked in excess of eight (8) hours in one day and/or forty (40) hours worked in one (1) week. Double (2x) time shall be paid for all hours worked in excess of ten (10) hours in one day and four (4) hours on a scheduled day off. Shifts will be worked in a continuous period except for meal breaks and will not be "split".

21.02 An employee retained more than six (6) minutes beyond the end of the shift to provide service to customers on delayed airline flights shall be paid not less than one half (1/2) hour at the applicable rate of pay.

* * *

21.05 When possible, the Employer will notify affected employees for overtime not later than the second hour of their shift on the day overtime is required.

21.06 Employees called out to work outside their regular shift or who are called in during scheduled days off, vacations or Statutory Holidays, will receive a minimum of four (4) hours pay at overtime rates provided the employee reports for such work.

* * *

21.10 Overtime will be offered in an equitable manner among the employees in a classification who are able to perform the work. In the event overtime commitments cannot be met on a voluntary basis, the qualified employee(s) with least seniority will be selected, subject to the notice required by 21.05.

* * *

21.12 The Parties agree that the Company will pay a premium of an additional two (2) hours pay, at the employees regular hourly rate of pay, per shift (until employee returns to their regular shift) if an employee is called to work outside their regular shift, provided however, the employee receives less than twenty-four (24) hours notice to report to a different shift.

* * *

21.15 **Transportation Home When Unscheduled Overtime Worked**

Where an employee is required to work unscheduled overtime, the Employer will, on request of the employee, provide or pay reasonable

costs for alternate transportation to the employee's home under the following conditions:

(a) provided that normal means of transportation is not available;

(b) where an employee is in a car pool arrangement, "normal means of transportation" shall be deemed to include the car pool;.

(c) for the purposes of this Clause 21.15, "unscheduled overtime" is defined as that overtime occurring where an employee is notified by the Employer during his/her scheduled shift that the employee will be required to continue working beyond the scheduled quitting time.

As indicated already, the Union's submissions proceed primarily from the requirement in Article 19.01 for each regular employee to have "an established shift":

ARTICLE 19 - HOURS OF WORK AND SHIFTS

19.01 Each Full Time Regular and Part Time Regular Employee will have an established shift. Shifts and shift hours required will be designated by the Employer. Changes of shift bids shall be posted for the information of affected Employees for a minimum of three (3) calendar days with such shift bids to begin at the start of the next full week; and whenever possible, the Company shall post such bid at the beginning of the week prior to the effective date of the bid. Employees will select shifts in order of seniority.

I repeat the observation by Employer's counsel that Article 21 is perhaps not "perfectly drafted". Nonetheless, upon closer inspection, it becomes apparent that the various elements can be read harmoniously in accordance with their plain meaning and consistently with the relevant case law.

Article 21.12 is a convenient place to begin. Where an employee receives less than 24 hours notice to report to a different shift, the Employer "will pay a premium of an additional two

(2) hours pay, at the employees regular hourly rate of pay, per shift (until the employee returns to their regular shift)".[1]

It seems fairly plain that Article 21.12 applies to circumstances where employees are called by the Employer to work outside their regular shift *for an entire shift* given the various references to "per shift", "regular shift" and "different shift". It seems reasonable to infer as well that the "different shift" cannot result in an employee working fewer hours than the "regular shift", or the two hour premium would become illusory. But I do not accept the Union's fundamental position that Article 21.06 is also engaged where employees work an entire shift that is not part of their established shift schedule.

There are at least three reasons for the foregoing conclusion. First, as will be explained, clauses such as Article 21.06 are broadly understood as having been negotiated for a different purpose. Second, the Union is essentially advocating a "pyramiding" of benefits; that is, it says employees are entitled to a minimum of four hours at overtime rates plus the premium of an additional two hours pay at their regularly hourly rate. I do not resile from what was written recently in *Catalyst Paper (Elk Falls Mill) -and- Communications, Energy and Paperworkers Union of Canada, Local 1123*, (unreported), May 3, 2012 (Hall); namely, that awards such as *Wire Pope Industries Ltd.* (1982), 4 LAC (3d) 323 (Chertkow), cited by the Employer have been overtaken by subsequent authorities in British Columbia (see *Catalyst*, at p. 18). A party no longer has a special onus or burden of establishing its interpretation of a collective agreement.

At the same time, I do not understand this arbitral change of perspective to have eliminated the rule of interpretation in *Pacific Press* that "a very important promise is likely to be clearly and unequivocally expressed". Indeed, the Union relies on this principle in the context of the Special Protection Grievance. Other, well-respected authorities stand for the proposition that sufficient clarity of mutual intent may be derived by necessary implication from the actual words used by the parties in their agreement. Thus, at a minimum, the outcome urged here by the Union should arise by necessary inference from the terms of the Collective Agreement; however,

[1] Aside from being grammatically challenged, this provision curiously refers to "the Company" and not "the Employer". The current Article 21.06 existed as Article 6.09 when what is now Article 21.12 was first added as Article 16.15 to the 1979-1981 Collective Agreement.

I am unable to discern any basis for making such an inference here. Indeed -- and this leads to the third reason -- the premium contemplated by Article 21.12 is paid at the employee's "regularly hourly rate of pay", and only where the employee receives less than 24 hours notice. Given this qualified straight time premium, it would be unreasonable to infer that the parties mutually intended an employee to also receive a minimum of four hours pay at overtime rates regardless of the advance notice provided by the Employer.

I have indicated that clauses such as Article 21.06 have a generally understood purpose. Before turning to some of the authorities, it is perhaps worth noting that neither the Union nor the Employer attaches any significance to the distinction in Article 21.06 between employees "called *out* to work" and those "called *in* during scheduled days off" (emphasis added). Many of the cases which have examined call out/call in/call back provisions turn, not surprisingly, on the specific words in issue: see, for instance, *Imperial Oil Strathcona Refinery and CEP., Local 777* (2004), 78 CLAS 178 (Elliot). But there is a common theme, as recognized in *Re NTN Bearing Mfg. Canada and U.S.W.A., Loc. 8890* (1995), 50 LAC (4th) 289 (Kennedy):

> … The basic purpose of collective agreement provision equivalent to art. 20 is described in Brown and Beatty, Canadian Labour Arbitration, 3rd ed., looseleaf (Aurora: Canada Law Book Inc.), at para. 8:3410 (August, 1995), in the following terms:
>
> > Call-in or call-back clauses ensure that an employee who actually reports for work, as required, receives a certain guaranteed minimum compensation regardless of whether work is actually performed. In interpreting these provisions, the majority of arbitrators have taken the position that their underlying premise is to compensate employees for the inconvenience, disruption, and expense that is caused by them being required to come into work, and accordingly, to ensure that the employer will not require its employees to report for work unless there is sufficient work available to justify the costs implicit in the call-in provision.
>
> Collective agreements are not negotiated in a vacuum, and they reflect the shared understandings of the parties as to the methods and procedures that are followed in the workplace. The collective agreement being considered on this arbitration contains distinct provisions dealing with overtime and further distinct provisions dealing with call-out entitlement. … (p. 299)

The clause examined in *Re County of Kent and Ontario Public Service Employees' Union* (1982), 8 LAC (3d) 188 (Swinton), can be contrasted with Article 21.06, but the general discussion is again instructive:

> Call-out pay is a special form of overtime pay. Many cases have examined the rationale for such a provision, which specifies a minimum payment for an employee called back to work after he has left the premises. In *Re Int'l Molders & Allied Workers Union, Local 49 and Webster Manufacturing (London) Ltd.* (1971), 23 L.A.C. 37 (Weiler), the board noted two reasons for a call-out provision in a collective agreement: first, to compensate the employee for the inconvenience and expense of being called back to work, and secondly, to discourage the employer from calling employees back unless there is a serious need for their services. Weiler emphasized the importance of two trips to entitlement to call-back pay. Where an employee works overtime continuously from the end of his shift or before and continuously up to the start of his shift, he should not receive call-out pay, in Weiler's view, because he has not been required to make an extra trip to and from work (pp. 40-1).
>
> The emphasis on two trips and overtime outside the regular shift and not contiguous to it has been approved in other cases: *Re Canadian Steelworkers' Union, Altas Division and Atlas Steels Co. Ltd.* (1964), 15 L.A.C. 123 (Hanrahan); *Re Shell Canada Ltd. and Oil, Chemical & Atomic Workers, Local 9-848* (1974), 6 L.A.C. (2d) 422 (O'Shea) at p. 429; *Re Int'l Brotherhood of Electrical Workers, Local 636 and Etobicoke Hydro Electric Com'n* (1967), 18 L.A.C. 219 (Arrell); *Re Hydro-Electric Com'n of Town of Mississauga and Int'l Brotherhood of Electrical Workers, Local 636* (1975), 8 L.A.C. (2d) 158 (Ferguson); *Re Falconbridge Nickel Mines and Sudbury Mine, Mill & Smelter Workers Union, Local 598* (1980), 26 L.A.C. (2d) 338 (Brown) at p. 341. In several of these cases, an employee who arrived at work early was asked to start before his regular hour. The employee had not been called at home by his employer.
>
> There are arbitrators who have rejected the two-trip theory: *Re Oil, Chemical & Atomic Workers Int'l Union, Local 9-633 and United Gas Ltd.* (1970), 22 L.A.C. 134 (Brown); *Re Int'l Assoc. of Machinists, Lodge 235 and Christie, Brown & Co. Ltd.* (1965), 15 L.A.C. 396 (Thomas). In *Re Campbell River & District General Hospital and Health Sciences Assoc.* (1978), 20 L.A.C. (2d) 425 (Maclntyre), the board rejected the two-trip theory. There, it was held that if the employee is called at home to report earlier than his regular starting time the next day, he should receive call-out pay. The board conceded that there is no greater inconvenience in such a case than there is in being asked to work overtime at the end of the shift, nor is there the cost of an extra trip. Nevertheless, the board held that the employee should be paid call-out pay. In contrast, had the employee been instructed to report early while at work on the previous day or should he

voluntarily report early and be put to work, he could not claim call-out. (p. 190-191)

A more extensive exploration of prior authorities was undertaken by one of Canada's pre-eminent arbitrators in *Re City of Toronto and Canadian Union of Public Employees, Local 79* (1983), 12 LAC (3d) 232 (P. Picher), and the following passage is found at pages 235-37:

A number of arbitration cases have considered the general purpose of call-in provisions. In *Re Hydro-Electric Com'n of Town of Mississauga and Int'l Brotherhood of Electrical Workers, Local 636* (1975), 8 L.A.C. (2d) 158 (Ferguson), the board made the following statement [at pp. 160-1]:

> A review of previous arbitration awards would appear to confirm a predominant view that the proper application of a call-back provision which contains a minimum guarantee for work performed when an employee is called in to work must be based on the fact that an employee has been subject to some degree of personal inconvenience or social dislocation. Also, there is recognized the factor of an employee having to incur additional transportation expense from having to make an extra trip to and from work. The majority of arbitrators have concluded that the reason why parties negotiate this type of clause is to recognize the fact that by being required to leave home or some other place and go to work at an abnormal time an employee finds some disruption or expense and, therefore, he is entitled to extra compensation. The call-back guarantee serves to insure that management, in receiving the benefit of having an employee called in to work at an irregular time, will be encouraged to make use of its rights only when the work is of sufficient importance to warrant the extra expenditure which must be incurred. It has also been stated that the essential character of a call-back is not merely that the employee is somewhere else at the time that he is asked to return to work, but rather that his work assignment actually begins at a time when it is necessary for him to make an extra trip to and from work.

The above quotation suggests a twofold purpose behind call-in pay provisions: first, to compensate employees for incurring the additional transportation expenses normally involved in being required to make an extra trip to and from work and, second, to place a restraint on management scheduling work at abnormal times by encouraging the company to evaluate whether the immediate performance of the work is sufficiently important to justify the added expense of the premium pay. (For a similar statement of purpose, see also *Re Int'l Molders & Allied Workers Union, Local 49 and Webster Manufacturing (London) Ltd.* (1971), 23 L.A.C. 37 (Weiler) at pp. 40-1.)

> The board's decision in *Re Hydro-Electric, supra*, reflects the above-stated *rationale* by concluding that the grievor was not entitled to call-in pay because the extra work he was called upon to perform was immediately prior to his regular shift and did not, therefore, necessitate an extra trip to work.
>
> In *Re Shell Canada Ltd. and Oil, Chemical & Atomic Workers, Local 9-848* (1974), 6 L.A.C. (2d) 422 (O'Shea), however, the board held that an employee was entitled to call-back pay even though he had not been required to make a second trip to and from work in order to perform the work in issue. The grievor, in fact, was still on company property when the request for the additional work was made. He had punched out and was in his car about to leave the parking-lot. The board distinguished the situation before it from cases similar to *Re Hydro-Electric* on the basis that in *Re Shell Canada*, the grievor had fully completed his earlier work and had left the building when the request that he perform the extra work was made. The board found therefore that, unlike the situation in *Re Hydro-Electric*, the additional work in issue was not contiguous with the grievor's earlier work. Although the board in *Re Shell Canada* accepted the frequently stated justification for the call-in premium noted above, it concluded that actually being required to make the additional trip was not a pre-condition to entitlement. …
>
> The determining factor for the board in *Re Shell Canada*, therefore, was that the work the grievor was required to perform was not contiguous with his earlier work. This is reflected by the board's definition of "call-out" at p. 429 of its decision:
>
> > Call-out work may be defined as unscheduled emergency overtime work which is not contiguous to an employee's regular shift. Extra hours which are worked immediately preceding or following a regularly scheduled shift are not normally subject to call-out provisions but are usually paid for at regular overtime rates.

Thus, there has been some arbitral debate over the precise rationale for call out/call in/call back provisions (i.e. whether transportation expense is a legitimate factor). But there has been general recognition that such guaranteed minimums are intended to compensate employees for the inconvenience and disruption occasioned by returning to work, and to ensure there is sufficient work available to justify the added expense of the premium pay. Further, it is immaterial whether the request to return to work was made during working hours or after the employee's shift: see *Webster Manufacturing (London) Ltd.*, discussed in *City of Toronto*, at pages 237-38. Nonetheless, a key question in all of these cases is whether the work is contiguous with the employee's regular shift -- where the work is contiguous, the employee is

entitled to overtime but does not qualify for the call out premium: see *County of Kent*, at page 191; and *City of Toronto*, at page 237. This feature appears evident from the wording Article 21.06 itself: the minimum payment applies to employees "called out to work *outside* their regular shift" (emphasis added), or called in during scheduled days off, vacations or Statutory Holidays.

The conclusion that Article 21.06 does not apply to work that is contiguous with an employee's shift is also consistent with Article 21.02. If the Union was correct, and Article 21.06 applied to all work beyond an employee's "established shift", the one-half hour payment in the earlier clause would be unnecessary. Moreover, Article 21.02 provides for the one-half hour to be paid "at the applicable rate of pay". This implies that overtime rates might not be applicable, and such would be the case for a part-time employee scheduled for less than an eight hour shift who is "retained more than six (6) minutes beyond the end of the shift to provide service to customers on delayed airline flights".

Based on what has been said to this juncture, it should be apparent that I agree in large measure with the Employer's position regarding interpretation of the Article 21 overtime provisions. Thus, for example, where an employee works more than 8 hours in a day and the additional hours are contiguous with the employee's shift, the rates in Article 21.01 apply and not the call out language. Otherwise, Article 21.01 would be redundant as full-time employees will always receive overtime rates for work beyond their regular 8 hour shift and, if the Union's interpretation of Article 21.06 were correct, part-time employees would get overtime rates for all hours over their scheduled hours. Where I depart with the Employer's approach is the contention that some "extra hours" do not attract overtime pay because the employee volunteers for the work, as opposed to being "forced" (other terms such as "required" and "mandatory" were also used at arbitration). The Employer submits this dichotomy flows from Article 21.10; however, in my view, the language has precisely the opposite implication. Once again, the clause provides:

> Overtime will be offered in an equitable manner among the employees in a classification who are able to perform the work. In the event overtime commitments cannot be met on a voluntary basis, the qualified employee(s) with least seniority will be selected …

The Employer asserts that when the Collective Agreement refers to “overtime”, it is referring to extra hours of work, as opposed to pay at overtime rates. Assuming that is true for purposes of Article 21.10, then the clause speaks only to how work will be offered to employees (i.e. on an equitable basis), and provides the Employer with the right to select the least senior employee when “overtime commitments” cannot be met. To that extent, the Article differentiates between voluntary and required overtime -- but there is nothing to indicate that the rate of pay will depend on this distinction. Indeed, as the Union submits, Article 21.10 expressly contemplates that “overtime” may be either voluntary or compelled. Based on the Employer’s assertion that the word “overtime” in Article 21.10 refers only to the extra work, one must look elsewhere to determine the rate of pay.

I am not prepared to conclude that the references to “called out”, “called in” and “called to work” in Articles 21.06 and 21.12 mean the premiums in those clauses do not apply where an employee voluntarily accepts a work opportunity made available by the Employer (recall as well that the Employer can avoid the latter premium by giving an employee more than 24 hours notice of the shift change). The *City of Toronto* award might initially suggest that call in pay does not apply where an employee volunteers to work. But that submission by the Employer is quickly dispelled by an examination of the facts. A public health nurse decided to visit a client after the end of her shift. Although the nurse’s supervisor had granted permission for the home visit because she trusted the nurse’s professional judgment, the circumstances were not regarded as a call out by Arbitrator Picher:

> … I am unable to conclude that a public health nurse is "called out" within the meaning of art. 6.04 when she herself decides, albeit in accordance with the best interests of her client, that she should return to work to perform overtime. When the employer is not the body scheduling the extra work or making the specific request that it be performed, the premium pay will not function to ensure a careful cost-benefit analysis prior to the scheduling of the work. A review of the jurisprudence reveals that a consistent mark of a call-out is that the request to return to perform the work is made by the employer. In a professional setting it is not unusual for an employee to make a judgment about the need for overtime work. Absent the clearest language in the collective agreement, however, it is extremely unusual to contemplate the added payment of a call-out premium when it is the employee herself who decides on the "call". In my view, the call-out

> clause was not intended to operate in these circumstances. If a public health nurse is requested by the employer to return to work, on the other hand, the operation of the call-out clause might well be triggered. (p. 240-241)

I note the suggestion in the above passage that a call out premium is triggered where an employee is "requested" (and not "required") to return to work. It also seems apparent that, in offering extra/overtime work to employees under either Article 21.06 or Article 21.10, the Employer is "the body scheduling the extra work or making the specific request that it be performed", regardless of whether the employees volunteer or are selected to meet overtime commitments. I also note that, while the public health nurse in *City of Toronto* did not receive the call out premium, she was compensated for the extra work at overtime rates.

There is another reason for rejecting the Employer's general distinction between employees who volunteer and those who are "compelled to work overtime": such a difference is effectively found in Article 21.15 which provides for transportation arrangements where "an employee is required to work unscheduled overtime". Article 21.15 expressly defines "unscheduled overtime" as:

> … that overtime occurring where an employee is notified by the Employer during his/her scheduled shift that the employee *will be required* to continue working beyond the scheduled quitting time. (emphasis added)

The eighth rule of interpretation in *Pacific Press* holds that where an agreement uses different words, one presumes the parties intended different meanings. As Article 21.15 deals expressly with circumstances where an employee is "required" to work unscheduled overtime, the absence of a similar qualification in Articles 21.06 and 21.12 closes the door to those premiums only applying where the work is required by the Employer -- whatever term is used to describe the compulsory element.

VII. CONCLUSION

To summarize the various interpretative conclusions reached in respect of the Union's Overtime Grievance:

- Article 21.01 provides the basic overtime rates, and the circumstances in which the rates will be paid based on "hours worked" by employees. The provision applies to, among other circumstances, extra hours which are contiguous with an employee's regular shift.

- Article 21.06 applies where employees are "called out" for work that is not contiguous with their regular shift, or are "called in" for work while on a scheduled day off, vacation or Statutory Holiday; and, in either circumstance, the call out/call in is for less than an entire shift.

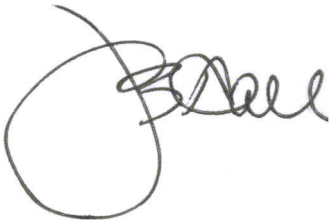
- Article 21.12 applies where employees are called to work a shift "outside their regular shift", provided they receive less than 24 hours notice of "the different shift".

- Articles 21.01, 21.06 and 21.12 apply regardless of whether employees perform the work on a voluntary basis or are selected (i.e. compelled) by the Employer.

I appreciate that my conclusions do not accord with the longstanding practice described by Ms. Safiq. Further, they may result in the Employer being subject to premium payments where employees have historically been paid at straight time rates. But as stated much earlier in this award, the Employer's practice cannot be held up as a defence to the Overtime Grievance -- ultimately, because it deviates substantially from the plain words used by the parties in their Collective Agreement. Put simply, it would require an impermissible amendment to Article 21 in order to perpetuate the voluntary/compulsory dichotomy asserted by the Employer. At the same time, the Employer will no longer be required to make at least one premium payment that it has made in the past; namely, part-time employees can be required to work extra hours contiguous with their shift, and are not entitled to overtime rates, unless they work more than 8 hours on that day.

In the result, the Union has achieved partial success, and I hereby make those arbitral declarations necessary to give effect to my interpretative conclusions. In the absence of a retroactive remedy being requested, the Employer is directed to apply Article 21 consistently with this award on a going-forward basis.

Dated at Vancouver, British Columbia on June 7, 2012.



JOHN B. HALL
Arbitrator